IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 62329-0-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
ANTHONY THOMAS NELSON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 1, 2010
	)	

Ellington, J. — Anthony Nelson appeals his conviction for four counts of felony harassment arguing that the trial court abused its discretion by allowing the State to amend the information at the beginning of trial, by admitting character evidence without proper analysis, and by denying his motion to sever one count from the others. Because Nelson fails to demonstrate any reversible error, we affirm.

BACKGROUND

In March 2008, Anthony Nelson moved out of the Auburn apartment he had been sharing with Lazett Rodriguez and their three children. Nelson began calling his former neighbors, Rachel Christenson and Jamilla Jordan, who maintained a friendship with Rodriguez. Nelson spoke with them about his relationship with Rodriguez and about his attempts to spend time with his children. Between March 22 and 24, Christenson called 911 twice to report that Nelson had threatened to kill her and her

children. Rodriguez also called 911 and reported to police that Nelson had threatened to kill her. On March 25, Rodriquez filed a petition for an antiharassment order. On March 26, in cooperation with police, Rodriguez arranged to meet Nelson to facilitate his arrest. Rodriguez then asked police to serve Nelson with her petition.

On March 31, 2008, the State charged Nelson with two counts of felony harassment for threatening to kill Rodriguez and Christenson. On June 10, the first day of trial, the court allowed the State to amend the information to add a second count of felony harassment as to Christenson and one count of felony harassment as to Jordan.

The jury found Nelson guilty as charged and the court imposed a standard range sentence. Nelson appeals.

DISCUSSION

Amendment of Information

Nelson first contends the trial court abused its discretion by allowing the State to amend the information on the eve of trial to add one count of felony harassment against Jordan. Under CrR 2.1(d), a trial court may permit the State to amend an information any time before verdict if the defendant's substantial rights are not prejudiced. Where, as here, an information is amended before the State rests its case in chief, the defendant must demonstrate prejudice under CrR 2.1(d).[1] We review a trial court's decision to allow the State to amend the charge for abuse of discretion.[2]

Here, the State provided notice of the new charge significantly before jury

[1] State v. Ziegler, 138 Wn. App. 804, 809, 158 P.3d 647 (2007); cf., State v. Pelkey, 109 Wn.2d 484, 487–90, 745 P.2d 854 (1987) (after State has rested its case in chief, any amendment except to a lesser charge or degree is reversible error per se).

[2] Ziegler, 138 Wn. App. at 808.

selection. The State filed the original information with only two charges on March 31,

2008. In an omnibus application filed May 5, the State indicated it intended to amend the information with "additional felony harassment counts."[3] On June 3, when Jordan attended Christenson's interview with the defense, the prosecutor learned for the first time that Nelson had also threatened Jordan. An omnibus order filed June 6, 2008, states that the trial date is June 10, and indicates that the State intended to move to amend the information with "additional counts of felony harassment vics: Rachel Christensen & her partner,"[4] and provide the defense with a copy of the proposed amended information on the day of trial. On June 10, the first day of trial, the trial court granted the State's motion to exclude witnesses and recessed for day. The prosecutor also provided the defense with a copy of Jordan's statement on June 10.

The State's proposed amendment was the first matter considered by the trial court on June 11. Defense counsel argued against the amendment, claiming to be surprised and unprepared for trial on the charge involving Jordan. Noting that the charge was "intertwined with the other events in this case" and was based on evidence that had "just recently come to light," the trial court allowed the amendment and stated it would recess to allow the defense to interview Jordan.[5]

Nelson argues that he was prejudiced by the amendment because he did not have adequate time to address the new evidence involved and a continuance would have delayed the trial another two months in light of the attorneys' schedules. But the record reflects that defense counsel interviewed Jordan before jury selection and that

[3] Clerk's Papers at 139.

[4] Clerk's Papers at 141.

[5] Report of Proceedings (June 11, 2008) at 19.

Jordan testified during pretrial hearings. During cross-examination at trial, defense counsel elicited favorable testimony from Jordan, who admitted that she and Rodriguez thought some of Nelson's prior behavior was funny rather than threatening. Nothing in the record indicates that defense counsel was unprepared for trial on the charge involving Jordan. Because Nelson fails to articulate or establish any prejudice to his substantial rights, we cannot conclude that the trial court abused its discretion by allowing the amendment.

Admission of Evidence

Nelson next contends that the trial court improperly admitted evidence of prior bad acts to impugn his character. In particular, Christenson and Jordan testified at a pretrial hearing that (1) Nelson had pushed and shoved Rodriguez; (2) Nelson had threatened to "beat" or "stab" Rodriguez; and (3) Nelson had a gang tattoo, wore gang colors and flashed gang signs. The trial court found each of these incidents relevant and less prejudicial to Nelson than probative of the victims' reasonable fear. In response to Rodriguez's testimony that she did not fear that Nelson would carry out his threat, the State also sought to admit Rodriguez's petition for an antiharassment order in which Rodriguez claimed she feared Nelson and described numerous incidents of threatening, abusive and bizarre statements and behavior by Nelson. The trial court admitted the petition as a prior inconsistent statement under ER 801(d)(1)(i). The trial court also offered to give the jury limiting instructions regarding its consideration of this evidence, but defense counsel never requested such instructions.

Evidence of prior bad acts is inadmissible to show the defendant's character or

propensity to commit crimes.[6] "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[7] Prior to admitting evidence of prior bad acts, the trial court must (1) identify the purpose for introducing the evidence, (2) determine whether the evidence is relevant to an element of the current charge, and (3) find that the probative value of the evidence outweighs its prejudicial effect.[8]

When a defendant is charged with felony harassment, evidence of a prior bad act or threat may be admitted to show that the victim's fear was reasonable.[9] In the domestic violence context, prior acts of domestic violence involving the defendant and the crime victim are admissible to assist the jury in judging the credibility of a recanting victim.[10] Admission of ER 404(b) evidence is reviewed for abuse of discretion.[11]

Nelson claims that the evidence regarding Nelson pushing and shoving Rodriguez was not relevant to whether Christenson and Jordan reasonably feared that he would carry out his threat to kill them. He also claims that Christenson's testimony of Nelson's threats to beat or stab Rodriguez on prior occasions was not relevant because Nelson did not carry out the threats. We disagree. To determine whether Christenson and Jordan reasonably feared Nelson would carry out his threat, the jury

---

[6] ER 404(b); State v. Lough, 125 Wn.2d 847, 862–63, 889 P.2d 487 (1995).

[7] ER 404(b).

[8] State v. Saltarelli, 98 Wn.2d 358, 362–63, 655 P.2d 697 (1982).

[9] State v. Binkin, 79 Wn. App. 284, 286–87, 902 P.2d 673 (1995), overruled on other grounds by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).

[10] State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126 (2008).

[11] State v. Peerson, 62 Wn. App. 755, 775, 816 P.2d 43 (1991).

was required to "'consider the defendant's conduct in context and to sift out idle threats from threats that warrant the mobilization of penal sanctions.'"[12] If the jury heard only of the pushing and shoving incidents or the prior threats to Rodriguez, it may have believed that Christenson and Jordan were overreacting to Nelson's threats. Thus, their knowledge of Nelson's prior violent acts and threatening statements was relevant to the reasonable fear element of felony harassment.[13]

Nelson also claims that the evidence regarding Nelson's supposed connection to a gang was not relevant and was more prejudicial than probative, because there was no evidence that Nelson had participated in gang violence. But both Christenson and Jordan testified that (1) Nelson referred to a specific gang in his threatening statements; (2) they were familiar with the particular gang to which Nelson referred; (3) they had seen Nelson with tattoos and clothing associated with that gang; and (4) their knowledge of the gang and belief that Nelson was associated with the gang caused them to fear he would carry out his threats to kill them and their children. As the trial court determined, this evidence was relevant and highly probative to the element of reasonable fear regarding both Christenson and Jordan.

Nelson next contends that the trial court erred by failing to conduct an ER 404(b) analysis on the record after finding Rodriguez's petition admissible as a prior inconsistent statement. The State concedes, and we agree, that the court should have evaluated the evidence on the record under ER 404(b).[14]

---

[12] State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999) (quoting State v. Alvarez, 74 Wn. App. 250, 261, 872 P.2d 1123 (1994)).

[13] Id. at 411–12.

[14] State v. Thach, 126 Wn. App. 297, 310–11, 106 P.3d 782 (2005) (although

An error under ER 404(b) is not constitutional in nature, so the question is whether it is reasonably probable the outcome of the trial was materially affected.[15] Nelson contends that the highly inflammatory and emotional nature of some of the statements in the petition probably affected the jury's decision. For example, the petition included allegations that Nelson (1) put his arms around Rodriguez's neck and said, "Die, die"; (2) fondled Rodriguez's breasts in public against her wishes; (3) said that if Rodriguez left him, he would kill her; (4) pulled a knife and acted like he would stab Rodriguez; (5) kicked in the door of Rodriguez's car; (6) got drunk and punched Rodriguez, leaving bruises; (7) once told Rodriguez that if she died, he would keep her body in a closet and have sex with it.

We are not persuaded that the outcome of the trial was materially affected by the admission of the petition. Although Rodriguez testified at trial that she never feared Nelson, the jury also heard untainted evidence supporting all the elements of the offense, including, (1) Rodriguez's report to police that Nelson threatened to "blow her brains out" and "shoot up her house"; (2) a recording of the 911call in which Rodriguez told the operator that she was "very scared of him now"; (3) Detective Orvis's description of Rodriguez as very upset, shaking and crying shortly after receiving and reporting Nelson's threatening call; (4) police testimony that Rodriguez assisted in Nelson's arrest and asked an officer to serve him with her petition for an antiharassment order; and (5) Christenson's testimony that Rodriguez had bruises

---

State used prior bad acts detailed in victim's statement to explain victim's attempts to minimize defendant's actions rather than to show propensity, trial court should have conducted ER 404(b) analysis).

[15] State v. White, 43 Wn. App. 580, 587, 718 P.2d 841 (1986).

inflicted by Nelson on a prior occasion. The error was harmless.[16]

Motion to Sever

Finally, Nelson contends the trial court erred by denying his motion to sever the count involving Rodriguez from the others. He contends he was prejudiced by the admission of highly inflammatory evidence introduced to show Rodriguez's fear that would not have been admissible to show fear on the part of the other victims.

CrR 4.4(a) requires a defendant to make a pretrial motion to sever and, if overruled, to renew the motion before or at the close of the evidence. If the defendant fails to do either, severance is waived and cannot be raised on appeal.[17] Nelson moved to sever the count involving Rodriguez before trial, but failed to renew his motion at or before the close of the evidence. He therefore waived the issue.

Affirmed.

Ellington, J.

WE CONCUR:

Cox, J.

Becker, J.

[16] See Thach, 126 Wn. App. at 311 (trial court's failure to conduct ER 404(b) analysis before admitting victim's statement regarding defendant's prior assault was harmless where victim, despite minimizing defendant's actions, testified to all elements of offense and made consistent statements of police and treating physician).

[17] State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329 (1987).